

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2014-CA-01509

BETH ANNE DONALDSON, COLIE
DONALDSON AND COBY DONALDSON

APPELLANTS

VERSUS

DOMINIC J. OVELLA

APPELLEE

Appealed from the Circuit Court of
Harrison County, Mississippi, First Judicial District

BRIEF OF APPELLEE

Oral Argument Not Required

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following person have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Trial Judge:

Hon. Lawrence P. Bourgeois
Harrison County Circuit Court

Appellants:

Beth Donaldson
Colby Donaldson
Colie Donaldson

Attorneys for Appellants:

Marcie Fyke Baria, Esq.
David M. Baria, Esq.
Robert C. Williamson, Esq.
Brandon Jones, Esq.

Appellee:

Dominic J. Ovella

Attorney for Appellee:

Dorrance "Dee" Aultman, Jr., Esq.

STATEMENT ON ORAL ARGUMENT

The issues raised by direct appeal are, at their core, controlled by previous precedent, and are properly found in law and fact; therefore, oral argument is not necessary.

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STATEMENT OF ISSUES

I. Whether the trial court properly granted summary judgment to Dominic Ovella for the Plaintiffs' claim of malicious prosecution.

II. Whether the trial court committed error by not allowing the same law firm to provide individual lawyers for each defendant during the trial of the matter.

STATEMENT OF THE CASE

i. THE COURSE AND PROCEEDINGS IN DISPOSITION IN COURT BELOW

On November 13, 2012, the Appellants individually filed complaints against Appellee, Dominic Ovella, alleging malicious prosecution concerning the underlying matter of *Dominic Ovella v. B & C Construction and Equipment, LLC; Colie Donaldson, Beth Anne Donaldson; Colby Donaldson; Alan M. Young; and Young Engineering Services*, Civil Action No. 1:10-cv-00285-LG-RHW.¹ Subsequently, the Donaldsons filed requests for admissions which sought Ovella to admit that each of the Donaldsons were entitled to \$150,000 in punitive damages. Ovella then removed the matter to Federal Court. [R. 4] Hon. Louis J. Guirola, Jr., the District Court Judge who ruled on the underlying matter of the federal litigation, remanded the matter back to state court based on the submission of individual affidavits of the Donaldsons stating in no uncertain terms that they would seek no more than \$75,000 each for damages. [R. 4, entries 5-7] On motion by Ovella, the matters were consolidated for all purposes including trial. [R. 4, entry 11; R. 6, entry 30] Ovella filed a motion for summary judgment and the Donaldsons filed a corresponding motion for partial summary judgment striking collateral estoppel and res judicata as a defense on July 1, 2014. [R. 8, 9] Oral argument was conducted and the Court granted Ovella's motion for

¹ Additionally, there have been two other lawsuits involving the Donaldsons and B & C Construction's bad faith claims for wrongful refusal to defend said case, which resulted in settlement, as well as B&C's litigation against Ovella in a subsequently filed matter, which ultimately was settled.

summary judgment by order dated October 1, 2014, and filed on October 8, 2014.

[R. 617-620] The Donaldsons filed this appeal on October 22, 2014.

ii STATEMENT OF THE FACTS

In March of 2008 Mr. Ovella entered into a fixed price contract with B & C Construction (a company owned by principals and/or officers of Beth Anne Donaldson, Coby Donaldson and Colie Donaldson) for the construction of a house for the total price of \$559,000. [R. 345, 346, 400-402] The contract contained a number of specifications, allowances and exceptions, but it was otherwise agreed that B & C would construct the house in accordance with the plans, including the specifications and drawings supplied by Ovella. [R. 400-402] The original plans called for 12x12 wooden pilings with brick cladding; however, during the course of the construction the brick cladding was deleted which would provide a credit for Ovella on the costs for those 36 columns. [R. 405-412] Additionally, the Donaldsons failed to comply with the plans and specifications in changing the support columns from 12x12 to 10x10 without informing Ovella.² [R. 362-365] [RE. 1]

Coby Donaldson testified as follows:

Q: Did Mr. Ovella ever specifically tell you that, yes, I want to use 10 by 10 timber columns in the construction of his residence?

A: Not that I can remember.

² Relying on Ovella's motion for new trial, in addressing the 12x12 to 10x10 change, the trial court stated "the jury was entitled to believe that the Ovellas approved of the new plans through their designer," not that Ovella personally directed nor authorized the change. [R. 203, 204] [Emphasis added] [RE. 2]

Q: Okay. Were you present during any conversations where Mr. Ovella ever stated that he wanted to use 10 by 10 columns in the foundation of his home?

A: No, not that I can remember.

Q: Did your father ever inform you that Mr. Ovella stated that he wanted to use 10 by 10 columns in the Ovella residence?

A: No.

Q: Did your father ever inform you that Mr. Ovella was aware that there were 10 by 10 columns in the Boudreaux residence?

A: Wait. Say that again.

Q: Did Mr. -- did your father ever indicate to you that Mr. Ovella had indicated to him that there were 10 by 10 columns used --

A: Oh.

Q: -- in the Boudreaux --

A: No.

Q: Now, to the best of your knowledge, whose decision was it to use 10 by 10 columns in the foundation of the residence?

A: That -- that would be my dad.

[R. 362, Coby depo., p. 53, l. 23-25; p. 54, l. 1-25;

Q: Okay. So you were informed by Mr. Ovella that he wanted to use 10 by 10s?

A: No. I was informed that he wanted to go back to the louvers.

[R. 364, Coby depo., p. 69, l. 9-22]

Ovella made timely progress payments totaling \$531,181.84. [R. 405-412]

Subsequently, on October 5, 2009, Colie Donaldson submitted the final invoice, which surprised Dominic Ovella, as it did not reflect credits he had been given for items which

had been deleted from the plans during construction. [R. 405-409] Additionally, there were items that still remained on the punch list which had not been corrected, as well as excessive swaying of the house. [R. 408-412] [RE. 3]

Ovella refused to pay the final bill until an accounting of the credits, completion of the issues involving the punch list and the swaying of the house were resolved. [R. 413-417]. On November 2, 2009, Donaldsons' attorney wrote Ovella concerning payment of the invoice. [R. 418] The Donaldsons contend that in the November 2, 2009, correspondence:

"B & C offered to make repairs if Ovella specified what repairs were specifically needed. Ovella never did so and continued to refuse payment."

[Appellant Brief, p. 4, ¶ 4] [Emphasis added]

That is an incorrect assertion, as on November 3, 2009, there was correspondence from Dominic Ovella to Colie Donaldson addressing the same, and also on November 11, 2009, to the Donaldsons' attorney with enclosures which included the punch list as well as specifically identifying the areas of problems. [R. 419, 420, 421] The discussions faltered as the long and short was that unless Ovella paid B & C \$40,000 toward the final bill there would be no corrective action. Ultimately, on March 1, 2010, Ovella filed the underlying lawsuit, which is the subject of the Donaldsons' malicious prosecution claims.

The Donaldsons' attorneys then answered and filed counterclaims and third-party complaints of Colie Donaldson, Beth Anne Donaldson and Coby Donaldson, individually. It should be noted that in the answer, counterclaim and third-party

complaint that there was no defense interposed on behalf of the individual Donaldsons stating that they were immune from suit on the basis of B & C's corporate status; rather to the contrary, they affirmatively sought individual redress from not only Dominic Ovella but also a non-party to the contract, Kathleen Ovella. [R. 434-448] The Donaldsons, in their prayer for relief, state:

Defendant B & C³ and the individuals Colie, Elizabeth Anne and Coby Donaldson, are entitled to a Judgment for damages from the Ovellas and/or Nick Ovella, including, but not limited to:

- a. Contractual damages;
- b. Costs, expenses, overhead and lost profits associated with the execution of the requested upgrades by the Ovellas;
- c. Specific performance;
- d. Incidental and consequential damages;
- e. Other Monetary damages;
- f. Attorneys' fees and expenses;
- g. Court costs and expenses;
- h. Emotional distress for the intentional infliction thereof;
- i. Punitive damages;
- j. Prejudgment and post-judgment interest; and
- k. Any and all other legal and equitable relief deemed appropriate by the Court.

[R. 446] [Emphasis added]

³ B & C claims were dismissed due to the fact that at the time of filing and time of contract they had no residential contractor's license. [R. 598-608]

A full litany of motions was filed in the prosecution of the underlying matter. Notably, a 12(b)(6) motion was filed on behalf of Kathleen Ovella against the third-party complaint of the Donaldsons which was granted in part and denied in part. It was granted as to the contractual claims that the individual Donaldsons assertion, but denied as to their individual claims for unjust enrichment. [R. 475-482] [RE. 4]

During the course of the federal trial, Judge Guirola granted judgment as a matter of law for insufficient evidence to support any unjust enrichment claim by any party, to include the Donaldsons' claims against Domnic Ovella as well as Kathleen Ovella. [R. 484-485; 606-610] [RE. 5] Ultimately, the jury found for B & C in the trial below. Several post-trial motions were filed to include judgment notwithstanding the verdict and judgment for sanctions on behalf of the Donaldsons, all of which will be discussed further in argument; however, the operative facts for the trial court's decision are concisely stated above.

SUMMARY OF ARGUMENT

i. SUMMARY JUDGMENT WAS PROPER

The trial court properly granted summary judgment for a myriad of reasons, any one of which support dismissal of the Donaldsons' complaint. The lynchpin of their claim for malicious prosecution, and the derivative actions therefrom, is that they should not have been named as individuals, but rather all claims should have been filed against their corporate entity, B & C Construction. The Donaldsons, instead of interposing an affirmative defense of avoidance by virtue of the limited liability corporation, chose to affirmatively prosecute the very same claims they contend were maliciously prosecuted by Ovella in the federal lawsuit.

The Donaldsons lost their individual counterclaims, and their third-party complaint, but yet now contend they are free to establish their limited liability corporation aspect of the company and ignore the judicial effect of their previous position as well as the court's previous rulings on their claims. As a matter of law, they are estopped from pursuing the malicious prosecution claim and raising a corporate shield in the instant matter, by waiver and collateral estoppel, as well as judicial estoppel. Further, there is no corporate shield for officers/employees of corporations who are involved in committing a tort. There is ample evidence of probable cause for Dominic Ovella to institute the underlying action, as well as a lack of malice exhibited by the facts, and found by the trial court in granting Ovella's motion for summary judgment.

Essentially, the Donaldsons' claim is one of "loser pay" versus malicious prosecution. Mississippi has not authorized any award of attorneys' fees or

costs in favor of a party who prevails in civil litigation, and therefore, summary judgment was proper in the instant matter, as the trial court concluded.

ii. THE COURT WAS CORRECT IN DENYING DONALDSONS INDIVIDUAL ATTORNEYS FROM THE SAME LAW FIRM

This issue is moot upon affirming the trial court's order granting summary judgment; however, the Donaldsons were represented by law firm of Baria-Williamson, PLLC throughout all of the litany of litigation involving the construction of the Ovella home. At no time did the individual Donaldsons ever have anyone other than the law firm of Baria-Williamson, PLLC representing them.

These matters were eventually consolidated for all purposes including trial and, after said consolidation, the Donaldsons then sought to have three separate members of the law firm to separately represent the three Donaldsons. The court did not abuse its discretion in denying the same since these are not separate independent attorneys, but rather partners in the same law firm. More importantly, this matter has been prosecuted throughout the federal court litigation and the underlying litigation by those same attorneys from Baria-Williamson, PLLC for the Donaldsons collectively. Generally speaking, as in wrongful death cases, each wrongful death beneficiary is entitled to his own independent separate counsel; however, multiple counsel from the same law firm do not constitute separate independent counsel.

ARGUMENT

A. STANDARD OF REVIEW

That standard of review is well-settled as *denovo*, and this Court applies the same criteria applied by the Circuit Court in the first instance. This Court can affirm on any reason granting summary expressed by the court below or any reason it deems appropriate. **Jacox v. Circus Circus**, 908 So. 2d 181 (Miss. Ct. App. 2005); **Celotex v. Cartte**, 477 U.S. 317 (1986). The party opposing summary judgment must produce significant evidence, specific facts and law demonstrating a basis for recovery that would support a jury verdict. **Smith v. First Federal Sav. & Loan Ass'n of Grenada**, 460 So. 2d 786 (Miss. 1984). Neither the trial court nor this Court is required to independently search the entire record in an effort to find substantial factual dispute. Miss. R. Civ. P. Rule 56 saddles the non-movant with the duty to designate the specific facts in the records to create genuine issues precluding summary judgment. **Celotex**, *supra*.

B. CIRCUIT COURT CORRECTLY CONCLUDED THAT THE DONALDSONS' CLAIMS ARE BARRED BY JUDICIAL ESTOPPEL, COLLATERAL ESTOPPEL AND WAIVER.

The Circuit Court correctly concluded that the Donaldsons' claims are barred by judicial estoppel, collateral estoppel and waiver. The Donaldsons' complaints are for malicious prosecution, along with all the derivative claims flowing therefrom. If their claim for malicious prosecution lacks an element then any derivative claim there from also fails as a matter of law. **McClinton v. Delta Pride Catfish, Inc.**, 792 So. 2d 968 (Miss. 2001). The Donaldsons' contention is that the individual Donaldsons should have

never been party to the underlying federal litigation, but rather the suit should have been filed solely against their limited liability company, B & C. (Even though they had no contractor's license and thus their third-party complaint and counterclaim were dismissed.) [R. 609] See **Ground Control v. Cupsco Industries**, 120 So. 3d 365 (Miss. 2013). The Donaldsons, in the trial below as well as on appeal, seem to be of the opinion that the denial of sanctions is the crux for collateral estoppel, judicial estoppel and waiver. That is not the case. They have failed to acknowledge, even at oral argument, the issue presented and raised by Ovella's motion for summary judgment. [T. 40] The issue is one of waiver, collateral estoppel and judicial estoppel, by virtue of the Donaldsons answering the underlying federal complaint, failing to interpose a defense of no personal liability by virtue of the corporate status of B & C Construction, and doubling down by filing their own individual counterclaim and third-party complaint. More importantly, they fully litigated their individual claims and lost—the very same claims they contend constituted malicious prosecution by Ovella. Now the Donaldsons contend they are free to interpose a corporate shield aspect of their claim to establish that there was no valid claim against them.

In **Rodwell v. Stieffel**, 126 So. 3d 915 (Ct. App. 2013), *cert denied*, 127 So. 3d 1115 (Miss. 2013), this Court noted that over a decade ago the United States Supreme Court in **New Hampshire v. Maine**, 532 U.S. 742, 121 S. Ct. 1808, 159 L. Ed. 2d 968 (2001), discussed the historical roots and purposes of the doctrine of judicial estoppel. It is recognized that circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle, but several

factors typically inform the process: (1) the later position must be clearly inconsistent with the party's earlier position; (2) the party must have persuaded a court to accept the earlier position; and (3) the party would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. ***Rodwell*** at ¶ 18. The United States Supreme Court quoted with approved language from a third circuit case that the doctrine prohibits litigants from playing fast and loose with the Courts. *Id* at ¶ 18. The doctrine states a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or successive series of suits. ***Rodwell*** at ¶ 18; *supra*.

It simply defies logic that in the initial federal litigation (which the Donaldsons claim is the basis of their malicious prosecution), the Donaldsons affirmatively and individually prosecuted and lost the same claim they contend Ovella maliciously prosecuted. In short, the trial court was eminently correct in concluding that the Donaldsons' claims are barred by judicial estoppel, collateral estoppel and waiver since a party should not be allowed to play fast and loose with the Court. *See also, Great Southern Box Co. of Miss. v. Barrett*, 94 So. 2d 912 (Miss. 1957), at 111, 112.

This waiver/estoppel fact was abundantly clear in Judge Guirola's ruling on motions for sanctions wherein the Court stated:

Early in the litigation of this case, the Court denied two motions for partial summary judgment filed by B&C and its individual members. One motion [188] requested judgment on alleged building code violations, and the other [189] requested judgment as to the Ovellas' duty to mitigate their damages. There was no motion regarding the claims B&C complains of here. It was only at the trial that the Court found the claims to lack

sufficient evidence to submit to the jury. (See Order Dismissing Individual Defendants and Unjust Enrichment Claims, Feb. 15, 2012, ECF No. 396).

Furthermore, it should be noted that the Defendants themselves brought claims to trial that the Court dismissed rather than submit to the jury. (See Order Dismissing Individual Defendants and Unjust Enrichment Claims, Feb. 15, 2012, ECF No. 396); Order Dismissing Counterclaims (ECF No. 397)).

[R. 560]

Judge Guirola pointed out the hypocrisy of the Donaldsons themselves committing the very same act of which they seek sanctions.⁴ [RE. 6] The law is well established that a party can affirmatively waive a defense by failing to raise it and actively participate in lawsuit. **Stuart v. University of Miss. Medical Center**, 21 So. 3d 544 (Miss. 2009). Here the Donaldsons clearly waive the matter as they interposed no defense whatsoever of a corporate shield in the underlying matter. Instead the Donaldsons doubled-down and filed their own individual counterclaims and third-party complaints, and in turn lost them. This res judicata effect of the collateral estoppel and judicial estoppel was created by virtue of them prosecuting and losing their individual claims against Dominic Ovella concerning the construction of the home in Pass Christian, Mississippi. Appellants also argue that there is no judicial estoppel since the federal court ruled against them and dismissed their individual claims, thus

⁴ It is no wonder that the plaintiffs immediately reduced their damage quantum to have this matter remanded by Judge Guirola after removal by Ovella. [R. 4, 39-41]

they did not benefit, citing *Booneville Collision Repair, Inc. v. City of Booneville*, 152 So. 3d 265 (Miss. 2014). [Appellant Brief, p. 19] This argument is fatal as, by so proceeding in this manner, the Donaldsons are admitting the matter was litigated and lost which would necessarily establish collateral estoppel. As noted in *Booneville*, there was no inconsistent position, but rather were alternative claims stating a Mississippi Tort action as well as a violation of a statutory duty. In the instant action, however, the Donaldsons' positions are wholly contradictory when prosecuting and losing unjust enrichment claims in the trial below. The Donaldsons further attempt to argue to this Court that somehow their individual counterclaims were compulsory and it is common practice to cover all potential bases in response to initiating pleadings. [Appellant Brief, p. 18]

That argument is factually flawed since the Donaldsons individually do not possess any claims for unjust enrichment, breach of construction contract nor specific performance of the contract if they are invoking a limited liability shield; hence, the inconsistent positions were established and properly found by the trial court below in granting Ovella's motion for summary judgment based on judicial estoppel. This argument is akin to being a little bit pregnant.

The Donaldsons argument is at best circular regarding judicial estoppel/waiver/collateral estoppel; however, as discussed above, their arguments fail.

The Appellants' contention that the trial court committed error by granting summary judgment is wholly without merit as there was ample evidence to support the decision that the Donaldsons are judicially estopped and collaterally estopped from

maintaining this action since they prosecuted and lost the same claims individually and cannot now claim a corporate shield to establish a malicious prosecution claim.

Further, they waived any limited liability corporate shield claims by the same conduct of prosecuting individual counterclaims and third-party claims. Kirk v. Pope, 973 So. 2d 981 (Miss. 2007); Rodwell, supra; Stuart, supra.

C. CIRCUIT COURT WAS CORRECT IN FINDING OVELLA HAD PROBABLE CAUSE AND LACK OF MALICE IN INSTITUTING THE UNDERLYING CIVIL ACTION.

The trial court additionally found that Ovella was entitled to summary judgment as a matter of law since there was a lack of malice and probable cause to file the underlying federal litigation. The trial court correctly applied the law in concluding that sanctions were not imposed on Ovella, that Ovella's claim survived not one but two motions for summary judgment, and the individual Donaldsons prosecuted and lost the very same claims against Ovella. All of the foregoing combined established probable cause for Ovella's action, and lack of malice on Ovella's part.

The Supreme Court has stated that it is the function of the trial court to determine whether or not probable cause existed before a matter is submitted to the jury in a malicious prosecution case. Owens v. Kroger, 430 So. 2d 843 at 846 (Miss. 1983).

In order to prevail upon a claim for malicious prosecution the plaintiff must show (1) the institution or continuation of the original judicial proceedings, either criminal or civil; (2) by the insistence of the defendant; (3) determinations of such proceedings in the plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceedings; and, (6) the suffering of damages as a result of the action or prosecution of

which is complained. **Joiner Ins. Agency v. Principal Casualty Ins. Co.**, 684 So. 2d 1242 (Miss. S. Ct. 1996). The absence of any of the elements is fatal to any claim for malicious prosecution. Moreover, under Mississippi jurisprudence, actions for malicious prosecution are regarded by law with jealousy and they ought not to be favored. **State for Use and Benefit of Foster v. Turner**, 319 So. 2d 233, 235 (Miss. 1975). Furthermore, where the proceeding is civil rather than criminal, the standards for probable cause under Mississippi law are more flexible. The initial civil lawsuit can be based on facts whose existence is not certain, but which the initial claimant believes that he can establish to the satisfaction of the court and jury. **Amoco, Inc. v. Southern Rock**, 778 F.2d 1134, 1137 (5th Cir. 1985). The Fifth Circuit in **Amoco**, quoting the Restatement Second of Torts and Mississippi Law, further explains:

[i]n a word, the initiator of private civil proceedings need not have the same degree of certainty as to the relevant facts that is required of a private prosecutor of criminal proceedings. In many cases, civil proceedings, to be effective, must be begun before all of the relevant facts can be ascertained to a reasonable degree of certainty."

Further, it is the function of the Court to determine whether or not probable cause existed before the matter is submitted to a jury in a malicious prosecution case. **Owens** at 846.

The denial of sanctions issue, which the Donaldsons seem to contend is the crux for any estoppel, is not the case. The trial court rather utilized the basis as discussed in the denial of sanctions for concluding that there was collateral estoppel by virtue of the Donaldsons filing and losing the very same claim. Further, combined with the denial of sanctions, Judge Bourgeois found that Ovella had probable cause to bring the federal action and correctly applied **Trilogy Communications v. Times Fiber**

Communications, 47 F. Supp. 2d 774 (S.D. Miss. 1998). Regardless of any res judicata, judicial estoppel, waiver or collateral estoppel, the trial court properly found that the Donaldsons have failed to meet their burden of proof regarding probable cause and malice. The trial court specifically found—even assuming that the matter is not barred by res judicata as to sanctions, collateral estoppel, judicial estoppel or waiver—there was probable cause for Ovella’s original lawsuit. [R. 621] The trial court properly concluded that the Donaldsons’ apparent dispute of fact was their belief that Ovella was out of money and was not going to pay them and therefore lied about paying them is not a material fact, nor is it admissible nor relevant in opposition to the motion for summary judgment. Hence, the Donaldsons failed to meet their burden of proof in opposing the summary judgment. **Jacox v. Circus Circus**, 908 So. 2d 181 (Miss. Ct. App. 2005). [R. 621] The court further analyzed the **Trilogy Communications** case regarding motives for filing a civil action as it applied to the instant matter and properly concluded,

Here there is no question that there is reasonable grounds for bringing this suit since obviously the parties were at impasse. There is no evidence Ovella sought anything other than to establish his rights under the construction dispute, he sought no extraordinary remedies, nor did he attempt to re-litigate previously decided matters. Moreover, this was nothing more than a routine civil case which this Court, after reviewing the submissions by the parties, finds sufficient evidence to constitute that Mr. Ovella’s lawsuit was instituted for the reason of resolving the dispute and as a matter of a law probable cause was sufficient.

[R. 622] **Trilogy**, supra.

The court did exactly what is required it in determining whether or not there was an absence of probable cause prior to allowing this matter to proceed.

Owens, supra. Obviously, the court found that there was not a lack of probable cause nor any malice by Ovella, and, as such, the Donaldsons' claims failed.

The Donaldsons argue that a limited liability corporation's individual members cannot be sued for torts/contracts of the corporation, but a limited liability act only shields members "solely based on their membership status." [Appellants Brief, p. 21, 22] [Emphasis added] The law is well established in Mississippi that any corporate employee, officer or agent, the agent who is actually committing a tort, in whole or part, can be sued independently and it does not matter what liability may attach to the corporation.⁵ For example, a company truck driver involved in an automobile accident has individual liability as well as the corporation having vicarious liability. A corporation cannot authorize a commission of a tort. This principle, absolutely without exception, is founded upon the soundest legal analogies and the wisest public policy. **Gloster Lumber Co. v. Wilkinson**, 118 Miss. 289 (Miss. 1918). This is a matter of semantics since the Donaldsons failed to raise this issue in the federal suit and have waived it by asserting and prosecuting individual claims on their behalf which is completely and wholly inconsistent with the defense of a corporate shield. **Stuart v. University of Miss. Medical Center**, 21 So. 3d 544 (Miss. 2009). Again, the Donaldsons have waived and/or are estopped from asserting a corporate shield element to their malicious prosecution claim; however, for argument sake, a LLC shield can be pierced when corporate formalities are not observed.

⁵ Ovella's claim against Beth Donaldson was as a member and principal shareholder of B & C for unjust enrichment only. [R. 241]

The Mississippi Supreme Court in *Stanley v. Mississippi Pilots of Gulfport, Inc.*, 951 So. 2d 535 (Miss. 2006), noted that the corporate veil may be pierced in a variety of situations and cited *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 352 S.E.2d 93, 98-99 (1986), listing 19 circumstances that permit a finding of personal liability. *Stanley* at ¶ 26. Notable factors listed in *Laya* are: (1) commingling of funds and other assets of the corporation with those of the individual shareholders; (2) diversion of the corporation's funds or assets to non-corporate uses (to personal uses of the corporate shareholder); (9) absence of separately held corporate assets; (11) sole ownership of all the stock by one individual or members of a single family; and (12) use the same office or business location by the corporation and its individual shareholders. *Laya*, supra.

Colie Donaldson, as a 30(b)(6) representative for B & C Construction, testified that they did not maintain any spreadsheets or accountings specifically for B & C Construction, rather they would charge most expenses on his and his wife's American Express card, which also contained personal expenses. [R. 349; Colie depo., p. 120, l. 16-25; p. 121; R. 350, Colie depo., pp. 122-123; R. 351, Colie depo., pp. 212-213] [RE. 7] They would then pay the entire American Express bill with corporate funds. [RE. 7] Further, B & C Construction's physical address is Colie Donaldson's home. [R. 351; Colie depo, p. 211, l. 1-9] Colie Donaldson further testified that B & C Construction was owned by himself and his wife. [R. 354; Colie depo., pp. 30-31] [RE. 8] Exhibit 2 to Ovella's motion for summary judgment was a compilation of American Express bills paid for by B & C Construction which contained numerous personal expenses of Beth Anne Donaldson, Colie Donaldson and Coby Donaldson that were paid with funds of B & C

Construction. [R. 126-140] [RE. 9] Clearly, by virtue of Colie Donaldson's testimony and undisputed facts, the corporate shield could easily be pierced by Ovella in the instant action. Again, the matter has been waived and the plaintiffs estopped; however, for sake of argument, there is a valid claim for personal liability. Stanley, supra; Laya, supra.

Frankly, the underlying action was nothing more than a garden variety dispute which required litigation. There is no evidence which would support submission of a malicious prosecution claim to a jury.

D. THE COURT WAS CORRECT IN DENYING DONALDSONS' INDIVIDUAL ATTORNEYS FROM THE SAME LAW FIRM.

This issue is moot upon affirmation of the trial court's order granting summary judgment; however, the trial court was correct and did not abuse its discretion by failing to allow the Appellants, after all cases were joined, to then be individually represented by one member of their chosen law firm. As discussed in argument, this particular move was made for nothing more than to somehow gain a tactical advantage with three members of the law firm representing the Donaldsons' having a speaking role. Earlier in the proceedings, the Donaldsons sought to depose Ovella on multiple occasions which necessitated counsel for Ovella noticing his deposition for each of their individual cases at one time. The Donaldsons filed a motion for a protective order, which was heard by the trial court and denied. [R. 45, entries 12, 13, 17] During argument on the motion to seeking withdrawal/re-appearance as separate individual representatives by Donaldsons' counsel, the fact was pointed out to the trial court that at time their motions were made Ovella's motion to consolidate had already been granted. There was no

affidavit filed by any of the individual Donaldsons seeking specific counsel or independent counsel. There was no conflict or conflicting positions between the Donaldsons that would require three attorneys. Further, that they are not independent counsel, but rather members of the same law firm who have participated fully during the course of discovery, the prosecution of the federal court proceedings below for bad faith/wrongful refusal to defend case, and B & C Construction v. Dominic Ovella. The tactic was just a subterfuge to obtain three separate openings, three separate closings, three separate examinations of witnesses, three separate sets of jury instructions, etc., which, obviously, is a judicial waste considering all of the Donaldsons have the very same position and claim and have been represented by the very same three attorneys throughout. Appellants contend that Dooley v. Byrd, 64 So. 3d 951 (Miss. 2011), and Long v. McKinney, 897 So. 2d 160 (Miss. 2004), provide for authority for this; however, a reading of Dooley and Long reveals otherwise as those are different law firms representing different plaintiffs and not merely three partners of the same firm representing three individuals. It is interesting to note that there were not three separate attorneys required for each individual Donaldson at the trial below in federal court, nor when they initially filed the suit was there a requirement that they have three separate attorneys.

For all the foregoing reasons, Dominic Ovella urges this Court to affirm the decision of the trial court, granting his motion for summary judgment and denying the Donaldsons' appeal in all respects.

CONCLUSION

The trial court granted Ovella's motion for summary judgment for res judicata, collateral estoppel, judicial estoppel and waiver, finding probable cause and lack malice; thus, it should be affirmed on all reasons; however, it is unnecessary to affirm the trial court based on all but any one of the foregoing well-founded reasons to support the trial court's decision.

RESPECTFULLY SUBMITTED, this the 22nd day of July, 2015.

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CERTIFICATE OF SERVICE

I, DEE AULTMAN, of Aultman Law Firm, Ltd., do hereby certify that a true and correct copy of the above and foregoing Brief of Appellee was filed via the Mississippi Electronic Court System which electronically sent a copy to:

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A copy of said Brief of Appellee was also sent via U.S. Mail to:

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SO CERTIFIED, this the 22nd day of July, 2015.

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